

JAMES L. HAWKINS
Claimant

SEVERY'S FARM TIRE SERVICES
Respondent

FEDERATED MUTUAL INSURANCE COMPANY
Insurance Carrier

The Administrative Law Judge (ALJ) awarded claimant a 40 percent work disability as a result of a December 28, 1998, work-related accident. Respondent appeals and contends the claimant failed to prove he suffered a work-related accident on December 28, 1998, while employed by the respondent. Instead, respondent argues that claimant's herniated disc at L4-L5 was not the result of a new accident but was the natural and probable consequence of a previous September 4, 1997, work-related accident that claimant suffered while employed by respondent. Furthermore respondent also argues, if claimant did sustain a new and separate accident on December 28, 1998, the more persuasive work disability evidence contained in the record proves claimant sustained a

36 percent work task loss and a 30 percent wage loss resulting in a 33 percent work disability. Respondent further argues claimant's permanent partial general disability award should be reduced by claimant's preexisting 5 percent functional impairment as required by K.S.A. 1998 Supp. 44-501(c), resulting in a permanent partial general disability award of 28 percent.

In contrast, claimant requests the Board to affirm the Award. Claimant contends he proved he suffered a new and separate accident on December 28, 1998, while employed by the respondent that caused a free fragment herniated disc at L4-L5 with right-sided radiculopathy. The herniated disc required surgical intervention causing claimant to suffer additional permanent functional impairment and need for permanent restrictions. The ALJ determined respondent failed to return claimant to work after the surgery and as a result claimant proved a 45 percent work disability. The 45 percent work disability was reduced by claimant's preexisting permanent functional impairment entitling claimant to a 40 percent permanent partial general disability award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' arguments, the Board makes the following findings and conclusions:

The Board finds the Award should be affirmed. The Board further finds that the Award sets out findings of fact and conclusions of law that are accurate and supported by the record. It is not necessary to repeat those findings and conclusions in this Order. Therefore, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

In particular, the Board finds claimant's uncontradicted testimony established that he suffered a new and separate injury while lifting at work on December 28, 1998. Claimant described the lifting incident and testified he told respondent's owner about the work-related accident on the day the accident occurred. Respondent's owner did not testify to contradict claimant's testimony. Moreover, after the December 28, 1998, lifting incident at work, claimant returned to see his personal physician, John H. Spencer, M.D., on January 15, 1999, with complaints of pain in his back and right leg. Dr. Spencer's January 15, 1999, medical note indicates that claimant's back appeared to be worsening and because of this worsening condition he referred claimant to orthopedic surgeon, Glen M. Amundson, M.D. Dr. Amundson had previously treated claimant for his September 4, 1997, work-related back injury. Dr. Amundson found claimant with a right L4-5 herniated disc with a free fragment. The doctor took claimant off work on April 13, 1999. On September 20, 1999, Dr. Amundson performed a right L4-5 laminectomy and discectomy.

In regard to claimant's permanent partial general disability, the Board agrees with the ALJ's determination that claimant suffered a 60 percent work task loss based on the opinions of both his treating physician Dr. Amundson and the court appointed independent medical examiner Dr. Philip R. Mills. The 60 percent task loss averaged together with a 30 percent wage loss resulted in a 45 percent work disability. But claimant had a preexisting 5 percent functional impairment as a result of his previous low back injury. As required by K.S.A. 1998 Supp. 44-501(c), the 45 percent work disability was reduced by the preexisting 5 percent functional impairment resulting in a 40 percent permanent partial general disability award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Steven J. Howard's March 8, 2002, Award, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of September 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton W. Kennard, Attorney for Claimant
Garry W. Lassman, Attorney for Respondent
Steven J. Howard, Administrative Law Judge
Director, Division of Workers Compensation

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c: Carlton W. Kennard, Attorney for Claimant
Garry W. Lassman, Attorney for Respondent
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Workers Compensation Director